

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2009-0369
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RICHARD CHARLES TUCCIO,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091004001

Honorable Jane L. Eikleberry, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri

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V Á S Q U E Z, Presiding Judge.

¶1 Appellant Richard Tuccio was convicted after a jury trial of kidnapping, (domestic violence), sexual assault, and second-degree burglary. On appeal he contends the trial court “fundamentally erred” when it granted the state’s request to preclude his mother from testifying that the victim had a drinking problem, and that the mother had seen the victim the morning of the preliminary hearing and believed the victim was under the influence of alcohol. We affirm for the reasons stated below.

¶2 We view the facts in the light most favorable to sustaining the verdicts. *See State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408 (2003). The victim, R., testified she had returned to her apartment just before 4:00 in the morning, having been out for the evening with friends at a nightclub. She explained she initially had planned to join Tuccio and his family for a “cookout” but had changed her mind. Tuccio was the victim’s former boyfriend and the father of her child. When she walked into her apartment, Tuccio, who did not live with R., was inside; he tackled her to the ground and began yelling obscenities at her and calling her names. He dragged her to her bedroom, closed the door, pulled her hair, hit her in the face, accused her of having sex with someone else, removed her pants and underpants, and put his fingers inside her vagina. R. woke up her hearing-impaired friend who was sleeping there with her own child and babysitting R.’s three children, by tapping her on the shoulder. The friend saw that R. was crying, that R. was wearing no clothing from the waist down, and that R.’s face was bruised. Tuccio had pushed R. into the bathroom and continued to yell at her. R. then called 9-1-1 and Tuccio left.

¶3 Before trial, the defense disclosed Margie Ayala, Tuccio’s mother, as a witness for the defense, believing that she would testify R. abuses alcohol, is frequently impaired, and appeared intoxicated at the preliminary hearing. The state moved to preclude Ayala from testifying that R. had been impaired at the preliminary hearing. The state argued the evidence was irrelevant and was not proper impeachment evidence under Rule 608(b), Ariz. R. Evid. Tuccio countered that R.’s use of alcohol was relevant to her credibility, specifically her “ability to perceive, remember, and relate” the events of that morning. After a hearing, the trial court denied the state’s motion to preclude Ayala from testifying, but ordered that Ayala be deposed.

¶4 On the first day of trial, the state again requested that Ayala be precluded from testifying about R.’s general use of alcohol and her apparent intoxication at the preliminary hearing. The state reiterated that R.’s purported intoxication at the preliminary hearing was irrelevant because she was going to testify at trial. The trial court granted the state’s request and ruled Ayala would “not be allowed to testify that the victim has any kind of drinking problem or that it was Ms. Ayala’s opinion that [R.] was under the influence the morning of the preliminary hearing.” The court added, “The preliminary hearing has no relevance whatsoever” and the “prejudicial effect of that evidence is far greater than it[]s probative value, although the Court does not see that it has any probative value.” The court instructed counsel to avoid asking Ayala questions that would elicit the precluded testimony.

¶5 On appeal, Tuccio contends the trial court’s ruling “violated [his] right to present evidence in his defense and to confront his accuser” under the federal and state

constitutions. And, he contends, the court abused its discretion in ruling the evidence was inadmissible under Rules 404 and 405, Ariz. R. Evid. He argues the error was fundamental and we must reverse because he was prevented from introducing evidence regarding the victim's credibility, which was crucial in this case because there was essentially no other evidence against him other than R.'s testimony.

¶6 “We review the admission or exclusion of evidence for abuse of discretion.” *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002). The trial court did not abuse its discretion here. The court correctly found the evidence was irrelevant. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ariz. R. Evid. 401. Evidence that R. had been intoxicated in the past was not relevant to her credibility with respect to the events that gave rise to these charges and the convictions. In particular, whether she was intoxicated at the preliminary hearing might have been relevant to her credibility at that time, but was not at all relevant here because she testified at trial. As the state correctly argued at the hearing on its motion, R.'s alleged intoxication at the preliminary hearing would be relevant only if the state were to use the transcript from that hearing at trial, which it did not do. The state conceded the relevance of evidence that R. had been intoxicated when the events occurred, but it was anticipated the victim would admit she had been drinking that night, which she did.

¶7 This case is distinguishable from *State v. Orantez*, 183 Ariz. 218, 902 P.2d 824 (1995), upon which Tuccio relies. There, the supreme court reversed the defendant's

convictions for sexual assault and kidnapping because the trial court had precluded the defense from introducing evidence that the victim, a long-time heroin addict, had “taken cocaine, was absent from her methadone program, and . . . most likely [was] using heroin” during the days before the assault. *Id.* at 222, 902 P.2d at 828. The court found that if the jury had known the victim “had consumed cocaine as well as alcohol within hours of the alleged incident, defendant could have argued more persuasively that her ability to perceive, remember, and relate was inhibited by drug use.” *Id.* at 223, 902 P.2d at 829. Here, in contrast, both the prosecutor and defense counsel questioned R. about her alcohol use the night and early morning of the assault. Evidence of R.’s alcohol use on other occasions was neither relevant nor proper impeachment evidence under Rule 608(b), Ariz. R. Evid. *See State v. Prince*, 160 Ariz. 268, 273, 772 P.2d 1121, 1126 (1989) (confirming Rule 608(b) permits evidence of witness’s conduct if probative of witness’s character for truthfulness or untruthfulness; acknowledging trial court’s broad discretion to exclude such evidence).

¶8 As the state points out, Tuccio argues for the first time on appeal the evidence was admissible character evidence “under [Rules] 404, 404(B), and 405, . . . as prior bad acts going towards a common scheme or plan for alcoholism and fights with Appellant.” Tuccio has waived these arguments, having previously failed to assert these grounds for admission, and has thereby forfeited the right to relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). We conclude the evidence was not proper character evidence and there was no basis for admitting it under any of the exceptions in Rule 404(b). And, because

R.'s character was not an issue in the case, the evidence was not admissible under Rule 405, Ariz. R. Evid. There was therefore no error, much less error that could be characterized as fundamental.

¶9 Similarly, Tuccio's contention that his constitutional rights were violated by the trial court's preclusion of this evidence, which he raises for the first time on appeal, fails as well. He has established no constitutional violation occurred, particularly given the fact that defense counsel had the opportunity to cross-examine the victim extensively. Additionally, as we have stated, the court's preclusion of the evidence is supported by the applicable rules of evidence. There was no error, much less error that could be characterized as fundamental, prejudicial error.

¶10 For the reasons stated, we affirm the convictions and the sentences imposed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge